No. 74-1249

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1974

MARTIN SKLAROFF AND
JESSE SKLAROFF, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners allege that the district court's failure to date fully a wiretap order rendered it invalid under 18 U.S.C. 2518, that the cumulative effect of several alleged violations of the wiretap statute denied them due process, and that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2518, is unconstitutional in violation of the First, Fourth, and Fifth Amendments.

Petitioners were convicted by a jury in the United States District Court for the Southern District of Florida on six counts of interstate transmission of wagering information, in violation of 18 U.S.C. 1084. They were also convicted by a jury in the United States District Court for the Northern District of Georgia of conspiracy to transmit wagering information interstate, in violation

of 18 U.S.C. 371, and (Martin Sklaroff on five counts, Jesse Sklaroff on two) of interstate transmission of wagering information, in violation of 18 U.S.C. 1084.[1] The Fifth Circuit consolidated the appeals on defendants' motion, and affirmed in both cases (Pet. App. A-1; 506 F.2d 837).

The undisputed evidence established that petitioners conspired to use and used the telephone to transmit from Florida to Georgia information which assisted in the placing of bets and wagers.[2] The prosecution's evidence in both the Florida and the Georgia case were derived from a single wire interception authorized by Judge Mehrtens of the United States District Court for the Southern District of Florida.

1. Petitioners contend first that the evidence derived from the wiretap should have been suppressed because of an incomplete date on the intercept order. The order authorized wire interception for a period of seven days

[1]In the Florida case, Martin Sklaroff was sentenced to two years' imprisonment on each of counts one and two, the sentences to run consecutively, and two years' imprisonment on each of counts three through six, the sentences to run concurrently with one another but consecutively to the sentences on counts one and two, for a total of four years' imprisonment. Jesse Sklaroff was sentenced to two years' imprisonment on each of the six counts, the sentences to run concurrently. In the Georgia case, petitioners were sentenced to three years on the conspiracy count and one year on each of the substantive counts, to run concurrently with one another but consecutively to the sentence on the conspiracy count, for a total of four years' imprisonment.

[2]In the Georgia case, co-defendant Elmer H. Dudley pleaded guilty and co-defendant Barney Tillman Berry was convicted by the jury. The court of appeals affirmed Berry's conviction along with that of petitioners (Pet. App. A-1 to A-10); Berry has not filed a petition for a writ of certiorari.

from the date of the order. Judge Mehrtens inadvertantly omitted, however, the month and year of the date, although the day of the month was specified, thus: "this 17th day of " (Pet. 11). In an order denying a pre-trial motion to suppress Judge Mehrtens amended the intercept order *nunc pro tunc* to read "this 17th day of June, 1969," to correspond with the facts (Supp. App. below 94-95).

It was also established at the suppression hearing that the intercept order was delivered to the agent in charge of the investigation outside the courtroom within minutes after it was signed by Judge Mehrtens; that the intercept equipment was installed on June 18, 1969; that the interception commenced on June 19, 1969; and that the intercept ended on June 24, 1969 (*id.* at 97, 243-247, 253-257). On July 8, 1969 the intercept order, as well as the application, the affidavit, and the tape recordings of the intercepted conversations were returned to Judge Mehrtens and were sealed (*id.* at 35-37).

Although the court of appeals did not explicitly treat petitioners' claim that the incomplete date rendered the intercept order void, the contention was considered and rejected by four district court judges.[3] Their rulings were correct and no further review is warranted.

[3]In the United States District Court for the Southern District of Florida, Judge Mehrtens denied a pre-indictment civil motion to suppress the evidence derived from the wiretap; Judge Cabot subsequently denied a similar motion made before trial in the criminal case. 323 F. Supp. 296. In the United States District Court for the Northern District of Georgia much the same motions were made and denied, respectively, by Judge Smith and Judge Edenfield. (Supp. App. below 93; *Dudley* v. *United States*, 320 F. Supp. 456, appeal dismissed as premature, No. 29382, May 13, 1970 (C.A. 5).)

A mistake made in the dating of an order such as the one here in question is no more than a clerical error subject to subsequent correction. When, as here, there is no dispute as to when a search warrant was issued and executed, the incomplete dating of the warrant may be rectified later and is not grounds for suppression of evidence seized pursuant thereto. *United States* v. *Matellian*, 31 F.R.D. 233, 234 (D. Mass.); *United States* v. *Hertel Athletic & Social Club, Inc.*, 25 F.2d 872, 873 (W.D. N.Y.); cf. *Flanagan* v. *United States*, 179 F.2d 703 (C.A. 6).

Indeed, Rule 36, Fed. R. Crim. P., expressly provides for such corrections: "Clerical mistakes in * * * orders * * * arising from oversight or omission may be corrected by the court at any time * * *." An error in the date of an intercept order is "a typical example of a clerical error" under this Rule. *United States* v. *Ceraso*, 355 F. Supp. 126, 128 (M.D. Pa.) (holding an *unsigned* intercept order invalid). Petitioners do not contest the facts as to when the order was signed and executed; nor do they assert any prejudice from the incomplete date or from the *nunc pro tunc* amendment. Under these circumstances Judge Mehrtens' subsequent correction of the date was effective under Rule 36 fully to rectify the initial omission in the order.

Petitioners' contention that the order was void because it authorized a wiretap of limitless duration is incorrect. The order specified that the interception was to be limited to seven days from the 17th. There could have been no doubt in the minds of the United States Attorney, the FBI agents, or the court as to which month and year were intended. The FBI agents received the intercept order on the 17th of June, 1969, within minutes after it was signed. Furthermore, since the

order was returned to the district judge for sealing on July 8, 1969, it could not possibly have been used in justification of interceptions beginning on the 17th of any other month or year. In short, there was no showing that the lack of specificity in the order permitted or led to abuse. See *United States* v. *Kahn*, 415 U.S. 143, 154-155. On the contrary, the evidence is undisputed that the FBI agents complied strictly with the seven day duration of the order.[4]

2. Taken alone or in combination, petitioners' remaining objections to the admission of the wiretap evidence against them do not show violation of due process or of "the Congressional intent" (Pet. 14) behind enactment of the federal wiretap statute.

a. Petitioners say that the application submitted to Judge Mehrtens was void because, although it accurately listed petitioners' telephone numbers, the letter from Assistant Attorney General Wilson to the United States Attorney, authorizing the application, listed the numbers incorrectly (691-9566 for 691-9561, and 961-9797 for 691-9797) (*id.* at 14-15). The court of appeals correctly

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[4]Petitioners' contention that such a finding conflicts with the ruling of the Sixth Circuit in *United States* v. *Lamonge*, 458 F. 2d 197, 199, is incorrect. In *Lamonge* the intercept orders contained neither year, month, nor date, and therefore by their terms authorized interception for any eight-day period beginning on a date wholly unascertainable from the face of the order. Intercepting agents, not knowing when the eight-day period actually commenced, might in complete good faith exceed the intended duration of such an order. In the instant case the date of commencement appeared on the order with sufficient specificity to obviate such a danger.

See also *United States ex rel. Rosner* v. *Warden*, 378 F. Supp. 1064 (S.D. N.Y.), rejecting a claim based on *Lamonge* that an intercept order was invalid because the "effective date" was not specified, although the order itself was dated. The court said that in *Lamonge* "the order was *undated*. Here the order bore the date of its issuance and it will be presumed to mark the beginning of the period prescribed." *Id.* at 1068 (emphasis in original).

found this claim "entirely without substance" (Pet. App. A-9). Furthermore, the actual authorization for the application came from the Attorney General (*id.* at A-10), whose memorandum informing Wilson of the authorization contained the correct telephone numbers (App. below 2694).

b. Petitioners contend next that the application for the intercept order was defective because the attached affidavit was not sworn to by the agent who wrote it. The application itself, however, which incorporated in abbreviated manner the facts set out in the attached affidavit, was sworn to before Judge Mehrtens by the attorney presenting it (Supp. App. below 199-209, 258-259). The attorney was familiar with the facts and circumstances set forth in the affidavit since he had closely supervised the agent who had written it and conducted the investigation (*id.* at 221-222); he was thus able to swear to reliable hearsay information known to the agent. Cf. *Whiteley* v. *Warden*, 401 U.S. 560, 568; *United States* v. *Ventresca*, 380 U.S. 102; *Rugendorf* v. *United States*, 376 U.S. 528, 533; *Jones* v. *United States*, 362 U.S. 257, 269. The requirement of both the Fourth Amendment and 18 U.S.C. 2518(1) that the warrant issue only upon oath or affirmation was therefore satisfied.

c. The court of appeals in the following words (Pet. App. A-9 to A-10) properly rejected petitioners' contention that the evidence should have been suppressed because of a two week delay in delivering the recordings to the issuing judge for sealing:

> The assertion that the government violated §2518 (8)(a) by failing to deliver immediately the recordings of the interceptions to the judge issuing the interception order at the end of the period of the order, is without merit. There was a delay of four-

> teen days. There was no showing of prejudice to the defendants in the delay. The purpose of this provision of the statute is to safeguard the recordings from editing or alteration. There was no showing that the integrity of the interceptions was in any way violated. The government accounted for the delay by showing that the recordings remained in the FBI evidence room for seven days and that the additional seven days were used in the preparation of search warrants.

See also *United States* v. *Falcone*, 505 F. 2d 478, 483-484 (C.A. 3), certiorari denied, February 24, 1975, No. 74-5619; *United States* v. *Poeta*, 455 F. 2d 117, 122 (C.A. 2), certiorari denied, 406 U.S. 948.

3. Petitioners' last contention, that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 is unconstitutional, has been rejected by every court of appeals that has considered the issue. Title III fully meets the constitutional requirements set out in *Berger* v. *New York*, 388 U.S. 41, and *Katz* v. *United States*, 389 U.S. 347. See *United States* v. *Ramsey*, 503 F. 2d 524, 526-531 (C.A. 7), certiorari denied, February 18, 1975, No. 74-5517; *United States* v. *Martinez*, 498 F. 2d 464, 467-468 (C.A. 6), certiorari denied, 419 U.S. 1056; *United States* v. *James*, 494 F. 2d 1007, 1012-1013 (C.A. D.C.); *United States* v. *Tortorello*, 480 F. 2d 764, 771-775 (C.A. 2), certiorari denied, 414 U.S. 866; *United States* v. *Bobo*, 477 F. 2d 974, 981-982 (C.A. 4), certiorari denied *sub nom. Gray* v. *United States*, April 14, 1975, No. 73-231; *United States* v. *Cafero*, 473 F. 2d 489, 496 (C.A. 3), certiorari denied, 417 U.S. 918; *United States* v. *Cox*, 449 F. 2d 679, 683-687 (C.A. 10), certiorari denied, 406 U.S. 934.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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